U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 18 July 2006

In the Matter of

IRA LESTER
Claimant

v.

L&L COAL COMPANY, INC.
Employer

and

OLD REPUBLIC INSURANCE CO.
Carrier

and

DIRECTOR, OFFICE OF WORKER' COMPENSATION PROGRAMS,
Party-In-Interest

Case No. 2004-BLA-06259

Appearances: Lawrence Webster, Esq. For the Claimant
Lois A. Kitts, Esq. Baird & Baird For the Employer

Before: William S. Colwell
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*. The Act and applicable implementing regulations, 20 CFR Parts 718 and 725, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR

§ 718.201 (2004). In this case, the Claimant, Ira Lester, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on June 28, 2005 in Pikeville, Kentucky. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18 (2004). At the hearing, Director's Exhibits ("DX") 1-48, Administrative Law Judge Exhibits ("ALJX") 1-3, Claimant's Exhibits ("CX") 1-2, and Employer's Exhibits ("EX") 1-6, 8-11 were admitted into evidence without objection. Transcript ("Tr.") at 4, 6, 7, 8, 10. I held the ruling on admitting EX 7 and EX 12, and gave the option to the Employer to later submit them for consideration. I would then consider any objections from the Claimant. EX 7 and 12 were not later submitted and are not part of the record. The parties were allowed to file post-hearing briefs. Briefs from Claimant and Employer were received December 15, 2005. The record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

PROCEDURAL HISTORY

The Claimant filed his initial claim for benefits on October 21, 1994. DX 1. A Department of Labor claims examiner denied the claim on March 24, 1995, for failure to establish any element of entitlement. DX 1, p. 204.

The record shows that no further action was taken until the current claim was filed on July 22, 2002. DX 3. Because it was filed more than one year after the previous denial, it is a subsequent claim governed by § 725.309(d). The claim was denied by the District Director of the Office of Workers' Compensation Programs ("OWCP") on January 28, 2004, on the grounds that the evidence did not show that the Claimant established the existence of pneumoconiosis or total disability. DX 39. The Claimant timely appealed that determination, and the case was referred to this office on May 11, 2004. DX 46.

APPLICABLE STANDARDS

Since this claim was filed after January 19, 2001, the current regulations at 20 CFR Parts 718 and 725 apply. 20 CFR §§ 718.2 and 725.2 (2004). In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose at least in part out of his coal mine employment, that he is totally disabled, and that the pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 CFR §§ 718.1, 718.202, 718.203 and 718.204 (2004).

ISSUES

After the hearing, the following are the remaining contested issues:

1. Whether the claim was timely filed.

2. Whether the miner worked at least 38 years in or around one or more coal mines.

3. Whether the miner has pneumoconiosis as defined by the Act and the regulations.

4. Whether his pneumoconiosis arose out of coal mine employment.

5. Whether he is totally disabled.

6. Whether his total disability is due to pneumoconiosis.

7. Whether L&L Coal Company, Inc. is the properly designated responsible operator.

8. Whether L&L Coal Company, Inc. has secured the payment of benefits through insurance.

9. Whether the miner has demonstrated that one of the applicable conditions of entitlement has changed since the date upon which the prior claim was denied.

DX 46; Tr. 6. (Employer withdrew the issues of whether Mr. Lester was a miner, and whether he worked as a miner after 1969. Tr. 6. Constitutional issues were preserved for appeal.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

Claimant testified to the following. Tr. 12-17. He worked in and around the coal mines for 38 years and testified that practically all of that was underground. He last worked in 1986. At that time, he found that he was having spells of blacking out and losing his breath so he moved to surface work, but when the problems continued, he felt he had to quit. He stated that coal mine employment is the only source of his dust exposure. As a surface miner, Mr. Lester ran an end loader but had trouble getting in and out of it because of the climbing. He also drove trucks but that also required him to climb.

Claimant also testified that he has difficulty walking uphill and has to stop after about ten steps to take catch his breath. He no longer has the strength to lift what he used to. He believes his condition is somewhat worse since the denial of his prior

claim, primarily based on his lowered breathing capacity. Mr. Lester stated that he coughs and wheezes more than he did two years ago. He also has difficulty sleeping and takes sleeping pills.

Length of Coal Mine Employment

Claimant alleged 38 years of coal mine employment. DX 3. The Social Security Earnings Statement, DX 7, verify the following coal mine employment:

Employer	Years Worked	Non-Overlapping Quarters
Saunders Coal Co.	1951	1
Belcher Coal Co.	1951	1
C&S Coal Co.	1952	3
Counts Coal Co.	1952	1
Bowles & Lester Coal Co.	1953	1
Margaret Ann Coal Co.	1953	2
CL Smith Coal Co.	1953-55	5
Levisa Coal Co.	1954	1
Beecher Coal Co.	1955-64	29
Muncy Coal Co. 5&7	1960	2
Jacks Creek Coal Co., Inc.	1964	1
Louisa Coal Co., Inc.	1964-65	4
L&L Coal Co., Inc.	1977-84	31
Total:		82 quarters or 20.5 years

The Social Security records also show that Mr. Lester was self-employed for the years 1968-72, 1974-77, 1979, 1981, 1984, and 1989. In his answers to interrogatories, Mr. Lester indicated that he worked for Little Beaver Coal Company from 1964 to 1984, at which time the name of the company was changed to L&L Coal Company, where he worked until 1986. DX 15. He also listed employment with Breacher Coal from 1954 to 1964. His tax returns reveal that he listed himself as self-employed in 1984 and 1985, and he and his wife together earned over $120,000 each year. DX 6. In 1986, the tax return shows earnings of about $88,000 but does not list his occupation. In his Description of Coal Mine Work, CM-913, Mr. Lester stated that he worked as a superintendent/foreman from 1973 to 1986 and as a truck driver from 1986 to 1988. DX 5. In his Employment History form, CM-911a, Claimant listed his employer as L&L Coal Company up to 1984 and L&L Trucking from 1984 to 1986. DX 4. On his claim application, Mr. Lester indicated that his last coal mine employment occurred in 1986. DX 3.

I find the Social Security records highly credible. I further credit Mr. Lester's testimony regarding his self-employment in the coal mining industry through 1986, as supported by his answers to interrogatories, the Social Security records, the CM-913 and his tax records. Thus, he has established two additional years of coal mine employment. Finally, I find credible Mr. Lester's answer to interrogatories that he worked for Little Beaver Coal Company, the predecessor to L&L Coal Company, from

1966 to 1984. This would account for eleven additional years of coal mine employment—1966 through 1976--that are not accounted for by the Social Security records. Consequently, I credit Mr. Lester with 33.5 years of coal mine employment.

Responsible Operator

Liability for payment of benefits to eligible miners rests with the responsible operator. Liability is assessed against the most recent operator that meets the requirements at 20 C.F.R. §§ 725.491-725.494. Section 725.495(c)(2) requires that the designated responsible operator establish "[t]hat it is not the potentially liable operator that most recently employed the miner."

In this case, L&L Coal Company, Inc. alleged, in a motion to dismiss dated July 2, 2003, that Claimant deposed that his last employer was L&L Trucking, not L&L Coal Company, Inc. DX 32; DX 34. A Department of Labor claims examiner denied the motion because Mr. Lester had listed L&L Coal Company as the responsible operator in his application for benefits and because his tax records did not show L&L Trucking as his employer. DX 31. In the Proposed Decision and Order Denial of Benefits, the claims examiner found L&L Coal Company to be the responsible operator based on the Social Security and tax records. The claims examiner further found that L&L had not submitted any evidence to support its position. DX 39.

Mr. Lester testified at his deposition that he last worked in 1986, and agreed that that work was with L&L Trucking. DX 16, p. 5. He stated that he hauled coal from Harmon to Poplar Creek and Mouthcard in Kentucky at the Potter Mining Company. He testified that he operated the trucking company for about two years "originally with the coal company and then . . . just little old trucks I bought." DX 16, p. 8. He also deposed that Old Republic was the company's insurance carrier. Department of Labor records relating to insurance coverage show that L&L Coal Company was insured from January 1, 1975 to May 1, 1984. DX 19. Mr. Lester also listed L&L Trucking as his employer from 1984 to 1986 on his CM-911a. DX 4. Somewhat contrary evidence comes in the form of the CM-913, in which Claimant stated that he was a superintendent/foreman from 1973 to 1986, presumably all for L&L Coal Company. DX 5.

While there is certainly evidence that casts doubt on L&L Coal Company, Inc.'s status as the responsible operator, I do not believe that the Employer has submitted sufficient evidence for me to make a finding in its favor. This issue was not addressed by the Employer in its post-hearing brief. Accordingly, I find that L&L Coal Company, Inc. is the properly designated responsible operator.

Timeliness

Under 20 CFR § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. 20 CFR § 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of

limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001).

In this case, the Employer contends that the claim is not timely but did not specify a reason for that contention. At Mr. Lester's deposition, he testified that he could not remember if any physician told him he had pneumoconiosis. DX 16, p. 20. No argument was made in the post-hearing brief relative to this issue. Employer elected not to cross-examine Mr. Lester at the hearing, so no testimony regarding the timeliness issue was elicited. Consequently, I find that Claimant is entitled to the presumption that the current claim is timely filed.

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The quality standards for chest x-rays and their interpretations are found at 20 CFR § 718.102 (2004) and Appendix A of Part 718. The following table summarizes the x-ray findings available in this case. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may be classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2004).

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the lists of readers issued by the National Institute of Occupational Safety and Health (NIOSH). [1] If no qualifications are noted for any of the following physicians, it means that I have been unable to ascertain them either from

[1]NIOSH is the federal government agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Historical information about physician qualifications appears on the U.S. Department of Health and Human Services, List of NIOSH Approved B Readers with Inclusive Dates of Approval [as of] June 7, 2004, found at http://www.oalj.dol.gov/public/blalung/refrnc/bread3_07_04.htm. Current information about physician qualifications appears on the CDC/NIOSH, NIOSH Certified B Readers List found at http://www2a.cdc.gov/drds/breaders/breaders_results.asp.

the record or the NIOSH list. Qualifications of physicians are abbreviated as follows: A= NIOSH certified A reader; B= NIOSH certified B reader; BCR= board-certified in radiology. Readers who are board-certified radiologists and/or B readers are classified as the most qualified. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B readers need not be radiologists.

Date of X-ray/ reading	Readers' Qualifications (all are doctors)	Reading and Film Quality	Result Concerning Presence of Pneumoconiosis
EX 1 10/2/02/ 10/2/02	Rosenberg B	0/0	Negative (Employer's evaluation)
DX 10 10/19/02/ 10/19/02	Baker B	1/0/Quality 1	Positive (Claimant's evaluation)
DX 11 10/19/02/ 10/31/02	Barrett B, BCR	Quality 1	Used by District Director for quality reading only[2]
DX 14 10/19/02/ 9/16/03	Halbert B, BCR	0/0/Quality 1	Negative (Employer's rebuttal of DX 10)
EX 1 4/21/05/ 4/21/05	Rosenberg B	0/0/Quality 1	Negative (Employer's evaluation)

Pulmonary Function Test

Pulmonary function tests (PFT) are performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. If there is greater resistance to the flow of air, there is more severe lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The quality standards for PFTs are found at 20 CFR § 718.103 (2004) and Appendix B. The following chart summarizes the results of the PFTs available in this case. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary test, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 CFR § 718.204(b)(2)(i) (2004).

[2] Used by the District Director (DD) for a quality reading only. This reading was not submitted or mentioned by either party; and thus, I will not consider it other than as a reading for film quality.

Ex. No. Test Date Physician	Age Height	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
EX 1 10/2/02 Rosenberg	67 70”	2.92	3.47	84%	67	No	Mild obstructive airway disease
DX 10 10/19/02 Baker	67 68 1/4”	2.83	3.36	84%		No	Within normal limits
EX 1 4/21/05 Rosenberg	70 69”	2.99	3.59	83%	65	No	Normal

Arterial Blood Gas Studies

Arterial blood gas (ABG) studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The quality standards for arterial blood gas studies are found at 20 CFR § 718.105 (2004). The following chart summarizes the arterial blood gas studies available in this case. A “qualifying” arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically not advisable. 20 CFR § 718.105(b) (2004).

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?	Physician Impression
EX 1	10/2/02	Rosenberg	40.5	73.9	No	
DX 10	10/19/02	Baker	39	79	No	
CX 2	10/2/03	Paranthaman	39	66	No	Moderate resting hypoxemia
EX 1	4/21/05	Rosenberg	40.5	89	No	

CT Scans

The Claimant underwent a CT scan on April 21, 2005. Dr. Rosenberg interpreted the scan and found that it revealed scattered granulomatous changes without micronodularity related to coal dust exposure. EX 1. I did not consider the second reading of this CT scan by Dr. Poulos, which was submitted as affirmative evidence at EX 6. In *Webber v. Peabody Coal Co.*, B.L.R. 1- ___, BRB No. 05-0335 BLA (Jan. 27,

2006)(*en banc*), the Board adopted the Director's position that "the use of singular phrasing in 20 C.F.R. § 718.107" requires that "only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence." The Board also directed that the proffering party must provide evidence to support a finding under § 718.107 (b) that the test or procedure is "medically acceptable and relevant to entitlement." Since, the Employer listed Dr. Rosenberg's reading of the April 21, 2005 CT scan reading first on its Evidence Summary Form (ALJX 3) ahead of the reading by Dr. Poulos, I will considered Dr. Rosenberg's reading.

I do find that the Employer has provided evidence that the CT scan is "medically acceptable and relevant to entitlement" in accordance with *Webber*. *Id.* Dr. Rosenberg stated in his medical report that "a CT scan is much more accurate in comparison to a chest x-ray for diagnosing the presence of coal workers' pneumoconiosis." EX 1. During his deposition, Dr. Rosenberg testified to the following at EX 3, page 21.

> Well, a CAT Scan is a much more accurate way of taking slices through the lungs to look at what's inside. It's really a diagnostic tool that is far superior than a chest x-ray when looking at the issue of interstitial lung disease and specifically coal workers' pneumoconiosis. Almost, you could think of a chest x-ray being a screening tool and a CAT Scan being a diagnostic method.

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis is a substantially contributing cause of the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in 20 CFR § 718.201. See 20 CFR § 718.202(a)(4) (2004). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2004).

Where total disability can not be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2004). With certain specified exceptions not applicable here, the cause or causes of total disability must be established by means of

a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2004). Quality standards for reports of physical examinations are found at 20 CFR § 718.104 (2004). The record contains the following medical opinions relating to this case.

Dr. Baker[3]

Claimant was examined by Dr. Glen Baker on behalf of the Office of Workers' Compensation Board on October 19, 2002. DX 10. Dr. Baker considered 38 years of coal mine employment, most recently as a truck driver but with 36 years being underground, family history, a medical history significant for wheezing, chronic bronchitis, arthritis, sleep apnea, neuropathy, a broken back, and a heart catheterization, and a history of having smoked a few cigarettes a day for an unspecified number of years before quitting 46 years ago. Claimant complained of a productive cough, wheezing, dyspnea, chest pain, ankle edema, and orthopnea. Physical examination was normal. Dr. Baker considered the results of an x-ray, a pulmonary function study, a blood gas study, and EKG. He diagnosed coal workers' pneumoconiosis based on the abnormal x-ray and coal dust exposure; minimal hypoxemia; chronic bronchitis based on his history of cough, sputum production, and wheezing; obstructive sleep apnea by history; and chest pain by history. He related the first three diagnoses to coal dust exposure. Dr. Baker found minimal or no pulmonary impairment but did fully associate that minimal impairment with the diagnoses he made. Dr. Baker is board certified in internal medicine and pulmonary disease.

Dr. Rosenberg

For the Employer, Dr. Rosenberg examined the Claimant on April 21, 2005. EX 1. Dr. Rosenberg is a board certified internist and pulmonologist, as well as a B-reader. He considered a history of smoking one pack of cigarettes a day for four to five years in the remote past, and 36 years of coal mine employment, lastly as a truck driver but underground for the majority of his work. The Claimant's medical history was significant for hypertension, diabetes, allergies, and arthritis. Mr. Lester complained of shortness of breath after climbing one flight of stairs, an occasional cough with sputum production, wheezing, and having to sleep on two to three pillows. Physical examination revealed a clear chest with no rales, rhonchi, or wheezes. Dr. Rosenberg also reviewed the results of an x-ray, pulmonary function study, EKG, and blood gas study. He further took into account the results of his October 2, 2002 examination of the miner. He did not diagnose medical or legal coal workers' pneumoconiosis. In his opinion, the granulomata seen on x-ray relate to a past infection. Dr. Rosenberg found no respiratory impairment that would be caused or hastened by coal dust exposure. Dr. Rosenberg opined that Mr. Lester is not disabled from a pulmonary perspective.

[3] In his Evidence Summary Form, Claimant designated Dr. Baker's report as his only medical opinion evidence. However, he listed the report as being dated February 8, 2003. In fact, the only report from Dr. Baker in the record is dated October 19, 2002, which coincides with the x-ray, PFT, and ABG designated by Claimant. There is no medical report in this record that is dated February 8, 2003. Accordingly, I will consider Claimant's designation a typographical error and will consider Dr. Baker's October 19, 2002 report.

Dr. Rosenberg provided an addendum to his opinion after he reviewed Dr. Paranthaman's October 15, 2003 report. EX 2. I note that although Claimant offered Dr. Paranthaman's report as CX 2, he did not designate the x-ray, pulmonary function study, or medical opinion as part of the evidence in his case-in-chief. He did, however, include the blood gas study of that date in his Evidence Summary Form. Accordingly, only the blood gas study portion of Dr. Paranthaman's complete pulmonary examination of October 15, 2003 will be considered in this decision. This seems a reasonable approach by the Claimant since Dr. Paranthaman's medical report does not support a finding of pneumoconiosis or total disability. Consequently, Dr. Rosenberg's review of Dr. Paranthaman's report, aside from the blood gas study, will not be considered. I note that Dr. Rosenberg stated that his review of the additional evidence did not cause him to change his opinions.

Dr. Rosenberg was deposed on May 23, 2005. EX 3. He provided his credentials and explained how he conducts pulmonary examinations. He explained that coal workers' pneumoconiosis generally causes the presence of crackles or rales upon inspiration when listening to the chest, whereas smoking causes rhonchi or wheezes with exhalation on physical examination. He went on to explain the conclusions that can be drawn based on pulmonary function studies and blood gas studies. Regarding his examinations of Mr. Lester, Dr. Rosenberg reiterated his opinions that Claimant does not have pneumoconiosis or any concerns from a pulmonary perspective.

Dr. Fino

Dr. Fino reviewed the medical evidence of record at the request of the Employer. EX 4. His report, dated May 31, 2005, was based on a review of eleven x-ray readings from March 1973 through April 2005, four pulmonary function and blood gas studies from December 1994, October 2002, and April 2005, hospital records from 1988, and the medical reports of record. Dr. Fino, who is board certified in internal medicine and pulmonary disease, found insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. He found no respiratory impairment and opined that from a respiratory standpoint, the miner is not totally disabled. Even assuming the existence of coal workers' pneumoconiosis, Dr. Fino's opinion regarding disability would not change.

Dr. Fino provided a June 7, 2005 addendum based upon the review of Dr. Paranthaman's report. EX 5. He too stated that Dr. Paranthaman's report and opinions did not cause him to alter his opinions.

Hospital and Treatment Records

The record includes the progress notes of Dr. Clinton Sutherland from November 25, 2002 to January 20, 2005. EX 8. They show that Dr. Sutherland diagnosed neuropathy, diverticulosis, vertigo, and angina. No mention of pneumoconiosis or pulmonary disability is made.

Also in the record are hospital records from Buchanan General Hospital from March 20, 2003 to May 24, 2004, when Claimant was attended by Dr. D. Patel. EX 8. These records show that Mr. Lester underwent CT scans of the chest on March 20, 2003, September 12, 2003, and May 25, 2004. All were read as benign.

DISCUSSION AND APPLICABLE LAW

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Company*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

Section 725.309(d) (April 1, 2002).

Claimant's most recent prior claim was denied after a Department of Labor claims examiner determined that Claimant failed to establish either the existence of pneumoconiosis or total disability. Therefore, in order for Claimant to avoid having his subsequent claim denied on the basis of the prior denial, he must establish one of these elements of entitlement through the newly submitted evidence.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or

pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201 (2004).

20 CFR § 718.202(a) (2004) provides that a finding of the existence of pneumoconiosis may be based on evidence from a (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions (not applicable here) described in Sections 718.304, 718.305, or 718.306, or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. In order to determine whether the evidence establishes the existence of pneumoconiosis, I must consider the chest x-rays and medical opinions – the two categories of evidence applicable in this case. As this claim is governed by the law of the Sixth Circuit, the Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at Section 718.202(a). *See Ferguson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (*en banc*).

Pneumoconiosis is a progressive and irreversible disease. *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993). As a general rule, therefore, more weight is given to the most recent evidence. See *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151-152 (1987); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 1167 (6th Cir. 1997); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 602 (3rd Cir. 1989); *Stanford v. Director, OWCP*, 7 B.L.R. 1-541, 1-543 (1984); *Tokarcik v. Consolidated Coal Co*., 6 B.L.R. 1-666, 1-668 (1983); *Call v. Director, OWCP*, 2 B.L.R. 1-146, 1-148-1-149 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Woodward*, 991 F.2d at 319-320; *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-600 (1984).

Of the four available x-ray readings in this case, one was considered positive for pneumoconiosis while three were found to be negative. There is also one reading made for quality purposes only. For cases with conflicting x-ray evidence, the regulations specifically provide,

Where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 CFR § 718.202(a)(1) (2004); *Dixon v. North Camp Coal Co*., 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co*., 16 B.L.R. 1-31, 1-37 (1991).

Readers who are board-certified radiologists and/or B readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985). Greater weight may be accorded to x-ray interpretations of dually qualified physicians. *Scheckler v. Clinchfield Coal Co*., 7 B.L.R. 1-128, 1-131 (1984). A judge may consider the number of interpretations on each side of the issue, but not to the exclusion of a qualitative evaluation of the x-rays and their readers. *Woodward*, 991 F.2d at 321; *see Adkins*, 958 F.2d at 52. Finally, a radiologist's academic teaching credentials in the field of radiology may be relevant to the evaluation of the weight to be assigned to that expert's conclusions. *See Worhach v. Director*, *OWCP*, 17 B.L.R. 1-105, 1-108 (1993).

Analysis of X-Ray Studies

The October 2, 2002 x-ray was found negative by Dr. Rosenberg, a B-reader. The film was not reread. Unfortunately, the only reference to this x-ray came in the form of Dr. Rosenberg's written summary of his October 2, 2002 examination of the miner; no ILO x-ray reading form for this x-ray was included as part of EX 1. Dr. Rosenberg's written summary states, "His chest X-ray reviewed by myself revealed no evidence of CWP (0/0); there was slight elevation of the left hemidiaphragm." Because this reading does not conform to the quality standards of paragraph c of § 718.102, I discount this interpretation.

The October 19, 2002 x-ray was found positive by Dr. Baker, a B-reader. He graded the film as quality 1. Dr. Barrett, a B-reader who is also a board-certified radiologist, also found the film to be quality 1. Dr. Halbert, another dually certified reader, agreed that the film was quality 1. He, however, felt it was negative for pneumoconiosis. In this case, I defer to the superior credentials of Dr. Halbert and consider this x-ray to be negative for pneumoconiosis. *Scheckler*, 7 B.L.R. 1-128, 1-131 (1984).

The final x-ray, taken April 21, 2005, was read by Dr. Rosenberg, a B-reader, as quality 1 and negative. It was not reread. This film complies with the quality standards. Based on Dr. Rosenberg's qualifications and the fact that his reading is not challenged, I find this x-ray negative.

In summary, there are one positive and three negative x-ray readings. I find the readings of the October 19, 2002 and April 21, 2005 x-rays to be the most probative. Based on the numerical superiority of the negative readings and the reading by the best qualified reader, Dr. Halbert, I conclude that the x-ray evidence fails to establish, by a preponderance of the evidence, the existence of pneumoconiosis.

Analysis of Medical Opinions

Medical Opinion Guidance

I must next consider the medical opinions. The Claimant can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co*., 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co*., 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, above. Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149, 1-155 (1989) (en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp*., 6 B.L.R. 1-1291, 1-1294 (1984). A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co*., 6 B.L.R. 1-1182, 1-1184 (1984). An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187 (6th Cir. 1995); *Justice v. Island Creek Coal Co*., 11 B.L.R. 1-91, 1-94 (1988); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236, 1-239 (1984).

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWC*P, 14 B.L.R. 1-2, 1-6 (1989). However, a judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration in … weighing … the medical evidence …" *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-105 (1994). Factors to be considered in weighing evidence from treating physicians include the nature and duration of the relationship, and the frequency and extent of treatment. In appropriate cases, a treating physician's opinion may be given controlling weight, provided that the decision to do so is based on the credibility of the opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 CFR § 718.104(d) (2004). The Sixth Circuit has interpreted this rule to mean that:

> in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade … For instance, a highly qualified treating physician who has lengthy experience with a miner may deserve tremendous deference, whereas a treating physician without the right pulmonary certifications should have his opinions appropriately discounted. The case law

and applicable regulatory scheme make clear that ALJs must evaluate treating physicians just as they consider other experts.

Eastover Mining Co. v. Williams, 338 F.3d 501, 513 (6th Cir. 2004) (citations omitted).

Balancing Conflicting Medical Opinions

The Claimant has also failed to meet his burden of proof to show – by medical opinion evidence – that he has pneumoconiosis. After weighing all of the medical opinions of record, I resolve this conflict by according greater probative weight to the opinion of Dr. Rosenberg for the reasons stated below.

Dr. Baker[4] diagnosed pneumoconiosis. His opinion is well documented, but his x-ray interpretation was reread by Dr. Halbert as negative. More importantly, there seems to be no other basis for his diagnosis other than the x-ray and Mr. Lester's coal mine employment history. For example, he noted that the miner's physical examination was normal. An opinion based on nothing more may be given less weight. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). For this reason, I place less weight on Dr. Baker's opinion.

Neither Dr. Fino nor Dr. Rosenberg diagnosed pneumoconiosis. Dr. Rosenberg read two x-rays as negative and neither was reread. His interpretations are, however, consonant with Dr. Halbert's. His physical findings pointed to a clear chest. Dr. Rosenberg's opinion is well documented and reasoned. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Therefore, I place more weight on it.

Dr. Fino's opinion is based on a review of all the medical evidence of record. That evidence provided Dr. Fino the most complete picture of the miner's health, and it supports Dr. Fino's conclusion. I find his opinion well documented and reasoned. Accordingly I place some weight on it. I further note that the CT scan evidence was negative, thus bolstering the opinions of Drs. Rosenberg and Fino. Furthermore, the hospital and treatment records are not relevant to this issue.

I determine that Dr. Rosenberg's opinion, as supported by Dr. Fino's, is the best documented and reasoned medical opinion. Therefore, I conclude that Mr. Lester has failed to establish the existence of pneumoconiosis pursuant to § 718.202(a)(4). Further consideration of all the medical evidence under § 718.202(a) leads me to also conclude that the x-ray evidence combined with the CT scan evidence and the most logical and credible medical opinions fails to establish the existence of pneumoconiosis.

[4] Drs. Baker, Fino, and Rosenberg share the credentials of board certification in both internal medicine and pulmonary disease. Thus, medical qualifications cannot be used as a basis for weighing one of these physicians' opinions more heavily than another's.

Pneumoconiosis Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). Because I have found that Claimant established 33.5 years of coal mine employment, he would be entitled to the rebuttable presumption set forth in § 718.203(b) that his pneumoconiosis arose out of coal mine employment if he had established the existence of pneumoconiosis.

Total Disability

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304 (2004), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment. 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2004). The Regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 CFR § 718.204(b) and (d) (2004). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 CFR § 718.204(d) (2004); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that the Claimant suffers from complicated pneumoconiosis or cor pulmonale. Thus, I will consider pulmonary function studies, blood gas tests, and medical opinions.

Pulmonary Function Tests

There are three PFTs. None produced qualifying values. Accordingly, I find that Claimant has not established total disability pursuant to § 718.204(b)(2)(i).

Arterial Blood Gas Studies

None of the four ABG studies supports a finding of total disability. Again, not one test qualified to show disability. Accordingly, I find that Claimant has not established total disability pursuant to § 718.204(b)(2)(ii).

Medical Opinions

Dr. Baker found minimal-to-no impairment. I find that this is not an opinion of total disability. Drs. Fino and Rosenberg opined that the claimant has no pulmonary impairment and retains the physiological capacity to continue his last coal mining job. The hospital and treatment records do not bear on this issue.

The opinions of all three physicians are supported by the pulmonary function and blood gas study results. Their opinions are also bolstered by their clinical findings. I consider their opinions to be well reasoned and documented. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Furthermore, their expertise in pulmonary medicine entitles their opinions to great weight. Accordingly, I place probative weight on them. I therefore conclude that the medical opinion evidence does not support a finding of total disability.

Lay testimony of disability

Although the Claimant has testified that he would be unable to return to his employment, I cannot base a finding of disability solely on his testimony, and it is greatly outweighed by the medical evidence.

Summary

In the instant case, none of the valid pulmonary function or blood gas studies produced values indicative of total disability. Therefore, total disability cannot be established pursuant to 20 CFR § 718.204(b)(i) or (ii) (2004). Moreover, the preponderance of the medical opinion evidence failed to establish total disability. Consequently, I find that Claimant has not established that he is totally disabled by a pulmonary or respiratory impairment. As a corollary, Claimant has not demonstrated that one of the applicable conditions of entitlement has changed since the denial of his last claim.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

The Claimant has failed to meet his burden to establish either the existence of pneumoconiosis or total disability. Consequently, he is not entitled to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. See Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim for benefits filed by the Claimant on July 22, 2002, is hereby DENIED.

A

WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:dj

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).